

# BUSINESS LAW SECTION

## CORPORATIONS COMMITTEE

### COMMITTEE MEETING MINUTES FOR SEPTEMBER 6, 2002

Friday, September 6, 2002  
Oakland

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Holiday Inn Express Hotel & Suites at the Oakland Airport on September 6, 2002. Attendance was as follows:

#### MEMBERS PRESENT:

Keith Paul Bishop  
John C. Carpenter  
Nelson D. Crandall  
Bruce Dravis B.  
James K. Dyer, Jr  
Teri Shugart Erickson  
James F. Fotenos  
Steven K. Hazen  
Mark T. Hiraide

Carol K. Lucas  
Brian D. McAllister  
David M. Pike  
Cynthia Ribas  
Randall B. Schai  
James R. Walther  
Daniel Weiser  
Neil J Wertlieb  
Nancy Wojtas

#### MEMBERS ABSENT:

David S. Caplan  
Timothy J. Fitzpatrick  
Eileen Lyon  
Keith Martin  
Ethna M. Piazza

#### LIAISONS PRESENT:

Hugh A. O'Boyle, Corporate Law Department Committee  
Gail Oshima, Department of Corporations  
Todd Vlaanderen, Secretary of State

#### GUESTS PRESENT:

Terry Miller, Legislative Office of the State Bar

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda which are not described in these Minutes.

#### I. ADMINISTRATIVE MATTERS.

**A. Opening Remarks and Announcements.** The meeting was brought to order by Co-Chair Neil Wertlieb at approximately 9:30 a.m. Mr. Wertlieb asked members and guests to introduce themselves. Mr. Wertlieb then announced the appointment of the following new members of the Committee, effective with the October meeting of the Committee:

#### Name

#### Law Firm

Stewart L. McDowell

Gibson, Dunn & Crutcher

Victor Hsu

Fulbright & Jaworski

Curt C. Barwick

Higham, McConnell & Dunning

Brian M. Wong

Pillsbury Winthrop

John H. Marlow

Crosby, Heafey, Roach & May

**B. Approval of Minutes of August 2, 2002 Meeting.** The draft minutes of the meeting of the Committee held on August 2, 2002 and previously circulated to the members of the Committee were approved with minor comments.

**C. Opinion Project.** Mr. Wertlieb opened the discussion of the opinion project by stating that the Committee is fully committed to this project and that the members of the Committee must agree on a plan to focus the group's efforts and move the project forward. Mr. Walther noted that there seemed to be some confusion as to whether the work product of the group was supposed to be an update of the 1989 Report on Legal Opinions in Business Transactions or a complete rewrite of the Report. Mr. Walther suggested that the goals of the project should be clearly stated so that members understand how to approach the tasks they have been assigned. He also suggested that a specific drafting plan for the report should be developed. Mr. Crandall said that he would develop a drafting outline and assignment list for discussion by the members at next month's meeting. The Committee also had a lengthy discussion concerning the Tribar approach to enforceability opinions. Mr. Crandall noted that issues concerning variations in enforceability opinions between California and the Tribar group should be left to the separate committee working on remedies opinion issues and that members of the Committee should focus on California law opinions given between California lawyers.

## **II. LIAISONS' REPORTS AND DISCUSSION.**

**A. Department of Corporations.** Gail Oshima reported that the Department of Corporations had reviewed SB399 and AB2969 and provided a favorable recommendation to the Governor. She also reported that the Department provided the Governor with reports on AB55 and SB783, without making a formal recommendation. Ms. Oshima also noted that the Governor's office recently issued a press release regarding legislation to increase penalties for securities fraud which will be reintroduced in the next legislative session. The Governor also announced the formation of an interagency task force, which will develop a plan to respond to issues raised by the recent federal Sarbanes-Oxley legislation. Ms. Oshima also reported that the Department has implemented the Seniors Against Investment Fraud ("SAIF") program to educate senior citizens about investment fraud schemes targeting senior citizens. Finally, Ms. Oshima noted that on August 27, 2002, the Department released a proposal regarding amendments concerning franchise investment rules, internet advertising and binding arbitration under the Franchise Investment Law.

**B. Secretary of State.** Todd Vlaanderen reported on recent activities of the Secretary of State, including restructuring the filing counters so that all filings (corporate, LLC and LP) are handled by the same filing desk, evaluating the name availability procedures for corporations and compliance with AB55, if it is signed into law. Mr. Vlaanderen also noted that the Secretary of State website has a number of filing tips, as well as a list of the most common reasons that a filing is rejected by the Secretary of State.

**C. NASD.** Mr. Wertlieb reported that, although Christine Connolly could not attend the meeting, she did send him an email reporting that on July 24, 2002, the NASD Board approved twenty five corporate governance proposals, which can be found at <http://www.nasdaq.com/about/proposedrulechanges.stm>.

**D. Partnerships and Limited Liability Companies Committee.** Steven Hazen provided an update on the activities of the Partnerships and LLC Committee. Mr. Hazen noted the meeting of the Partnership Committee scheduled for September 5th had been cancelled. He also reported that written comments with respect to special purpose entity consolidation have been submitted to the FASB and these comments should be available on the FASB website. FASB will consider these comments at an open meeting on September 30th.

**E. UCC Committee.** Jim Dyer reported that the UCC Committee will be meeting next week. The committee will be reviewing possible changes to UCC Articles 1, 3 and 4 and is also monitoring the implementation of the Article 9 revisions.

**F. Health Law Committee.** Carol Lucas reported that the Health Law Committee met last month and discussed a number of substantive health law issues, as well as organization of the committee. Since Ms. Lucas is completing her term on the Corporations Committee, she asked that anyone interested in serving as liaison to the Health Law Committee contact her.

**G. Corporate Law Department Committee.** Hugh A. O'Boyle reported that the Corporate Law Department Committee is active and growing. The committee published an article about multijurisdictional practice in the Business Law News and is working on an article about legal opinions by in-house counsel. Mr. O'Boyle also noted that the committee will be presenting a program on doing business in China at the annual meeting of the State Bar next month in Monterey.

### **III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.**

**A. Report of Legislative Liaison.** Mr. Fotenos summarized the following legislation of interest to the Committee:

- **AB601 (Leach)**  
Passed and signed. 2002 Stats ch. 179.
- **AB1875 (Nakano and Correa)**  
Passed August 15. Enrolled August 22nd. On Governor's Desk.
- **AB2355**  
Passed and enrolled August 22nd.
- **AB2873 (Frammer and Correa)**  
Passed and signed by Governor August 23rd. 2002 Stats ch. 230.
- **AB2969 (Florez)**  
Passed and enrolled. To Governor's Desk August 31st.
- **SB399 (Ackerman)**  
Passed and enrolled on August 29th.
- **SB1472 (Romero)**  
Passed and signed. 2002 Stats ch. 173.
- **SB1473 (Machado)**  
Renumbered SB1926, passed and enrolled August 30th.
- **SB1814 (Dunn)**  
Died in the Senate B&P Committee on June 25th.

**B. SB399 (corporate conversions).** Mr. Wertlieb reported that SB399 was approved unanimously by the Senate and is now at the Governor's office for signature. Mr. Wertlieb noted that two final changes had been made in the legislation prior to final approval - at the request of the Franchise Tax Board, a carve-out was added regarding the tax effect of a conversion and at the request of the Secretary of State, a \$250 filing fee will be imposed for conversions (which will be reduced to \$150 in 2005).

**C. Other.** Members engaged in a lengthy discussion of AB55, which would establish expanded reporting disclosure requirements for publicly traded companies incorporated or qualified to do business in California. This bill was drafted and adopted in response to the recent publicity concerning corporate governance issues and is now with the Governor for signature. Mr. Bishop reported that he had drafted an opposition letter addressed to the Governor, which was circulated to members of the Committee and is now with the Executive Committee for review. Mr. Miller reported that, initially, the Chamber of Commerce, PacBell and Charles Schwab & Co. had opposed the bill, but that opposition to the bill has now diminished. The Committee unanimously approved a motion by Mr. Hazen approving the letter, as drafted by Mr. Bishop, and authorizing Mr. Bishop, in consultation with Messrs. Walther and Wertlieb and the Executive Committee, to make any final changes necessary prior to Messrs. Walther and Wertlieb sending the letter to the Governor expressing the Committee's reasons for urging that AB55 be vetoed. Mr. Vlaanderen said that he would send a copy of the letter to Bill Jones, Secretary of State and Ms. Oshima said that she would send a copy to Demetrious Boutris, Commissioner of Corporations.

Terry Miller suggested that the Committee may want to consider legislation concerning Board meetings by electronic transmission currently in AB3028, which would amend Corporations Code Section 307 to provide for a sunset provision terminating the legality of Board meetings by electronic transmission after January 1, 2004. Mr. Wertlieb said that the Committee may want to include such a legislative proposal as part of a broader effort by the Committee addressing corporate governance issues in the Corporations Code.

#### **IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS.**

**A. Secretary of State Fax Filings.** Mr. Dravis reported that the legislative proposal regarding fax filing has been approved by the Executive Committee and has now been sent to other State Bar sections for review and comment. Mr. Miller stated that he had not yet received any comments on this proposal from interested parties. The proposal must next be submitted to the State Bar Board of Governors for final approval and then a sponsor must be found in the legislature to carry the bill.

**B. 25118(b) Definition of Aggregate Evidence of Indebtedness.** Mr. Weiser led a discussion of Corporations Code Section 25118(b) and proposed changes that would allow borrowers to aggregate borrowings for purposes of determining the dollar threshold for loans exempt from usury provisions as well as expanding the list of entities exempt from usury provisions. Mr. Wertlieb said that he would recirculate Mr. Weiser's memorandum to the members of the Committee and requested that members read the memorandum in preparation for a discussion at next month's meeting.

#### **V. OTHER PROJECTS.**

**A. Educational Activities.** Mr. Dravis reported that Ms. Ribas submitted an article to the Business Law News regarding differences in California and Delaware corporate law. The article will be published in the October issue. Mr. Dravis then reported that the Committee will be presenting programs about choice of entity and fiduciary duties of directors at the annual meeting of the State Bar next month. Mr. Wertlieb noted that the Committee has proposed programs about the Sarbanes-Oxley legislation, Nevada law for California practitioners and covenants not to compete for the Business Law Section Winter Education Institute.

## VI. NEW BUSINESS

**A. Practice Issues.** Members discussed practice issues concerning the Sarbanes-Oxley Act of 2002. Mr. Fotenos discussed the implications of a knowledge qualification for a Section 906 certification. Mr. Schai discussed the prohibition against loans to executives and whether that applied to advances of litigation costs to directors or executives. Mr. Bishop discussed the definition of "issuer" under Sarbanes-Oxley and noted that in a public debt financing a guarantor may be deemed to be an "issuer" and, therefore, be required to comply with the requirements for an independent audit committee.

The meeting was adjourned at approximately 12:30 p.m.

/s/ David M. Pike  
David M. Pike  
Secretary

**Corporation Committee Meeting Minutes**

